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## RESEARCH ARTICLE

# PARTY REGULATION AS A SELF-LEGITIMIZING SYSTEM

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**ABSTRACT:** The aim of this article is to contribute to a reflection on the endogenous nature of party regulation and on the ways in which law making can be used by political actors to foster a privileged legal environment. The article first provides a review of the literature about party regulation and its main approaches. Secondly, building on a comprehensive database of party regulation in Europe, it draws attention to the presence of functional definitions of political parties in party law and speculates as to why such non-prescriptive statements have been introduced. In the conclusions, it suggests that presenting themselves as 'eufunctional' performers, political parties have strengthened their legal status and (self-)legitimized their institutional centrality, ensuring their organizational survival within the system independently from their declining capacity as vehicles of political representation. Further lines of inquiry and cross-fertilization between disciplines are suggested and encouraged.

**KEYWORDS:** Political parties, party regulation, institutional endogeneity, functionalism, self-interest, political representation

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## 1. Introduction

Party regulation has acquired momentum. A growing number of European states have adopted legislation on political parties, either imposing restrictions or conferring privileges to them. Moreover, party regulation is increasingly being portrayed as a crucial regulatory instrument for the promotion of democracy and its values and as a means by which parties can re-establish their political legitimacy and regain citizens' trust. Yet, some critics have argued that rather than constituting a tool for enhancing democratic processes and restoring legitimacy, party regulation constitutes an instrument that political parties can exploit in their own advantage for entrenching the electoral position of established groups and self-perpetuating the political status quo (Paltiel 1979). The introduction of rules providing state funding to political parties was observed by Katz and Mair as a key indicator of an instrumental use of party legislation aimed to strengthen the parties' position within the state while compensating for their weakening linkages with society (1995). This article draws attention to another indicator possibly pointing in the same direction: it concentrates on the functional definitions of political parties. Indeed, beyond determining who is entitled to be recognized as a political party, what forms of activity parties may engage and what forms of internal organization and political behavior are acceptable for parties (Katz 2004, 2-3), party regulation also includes provisions that define party functions.

Building on a comprehensive database of party regulation in Europe,<sup>1</sup> this article highlights the presence of these definitions and speculates as to why such non-prescriptive statements have been introduced. It suggests that references to the parties' 'eufunctions' are a means by which legislators (the parties themselves) aim to self-legitimize their institutional centrality and justify the introduction of state subsidies. By doing so, this article aims to contribute to a reflection on the endogenous nature of party regulation and on the complex interaction between legal rules, politics, and democracy.

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<sup>1</sup> *Re-conceptualizing Party Democracy* is a research project funded by the European Research Council (ERC) and based at Leiden University. The database includes 33 democracies in Eastern and Western Europe ([www.partylaw.leidenuniv.nl](http://www.partylaw.leidenuniv.nl)).

## 2. Party law: approaches and challenges

Party law is defined as “the total body of law that affects political parties” (Müller and Sieberer 2006, 435). Such laws are numerous, and include electoral acts regulating the selection of the parties’ candidates for public office; media acts concerning rules of party access to broadcasting channels, as well as other types of regulation such as of administrative rulings, legislative statutes, and court decisions. However, Constitutions, Party Laws, and Party Finance Laws are commonly observed as the main sources of party regulation, as they are specifically concerned with matters of party affairs (van Biezen 2008).

Party regulation in Europe has increased considerably since the end of the Second World War, as a growing number of countries have included references to political parties in their Constitutions and have adopted specific legislation defining the operation, the functioning and the financial management of political parties. With the exception of Belgium, Denmark, Ireland, and the Netherlands, all European countries have included references to political parties in their Constitutions (van Biezen and Borz 2012); 23 countries introduced a specific law regulating political finance; and 21 countries adopted a specific law on political parties (Piccio 2012). All in all, as Katz remarked, political parties have become “legitimate objects of state regulation to a degree far exceeding what would normally be acceptable for private associations in a liberal society” (Katz 2004, 90).

Concomitantly to the growing regulation of political parties and in the light of the importance that party regulation has for structuring the functioning of representative democracies in which political parties play a pivotal role, research on the subject has increased significantly in recent years. Three main approaches to party regulation can be identified: regulation in terms of its substantive content; regulation as an independent variable; and regulation as a dependent variable.

In terms of the substantive content of legal provisions, both legal scholars and political scientists have been analyzing how political parties are being regulated (Kommers 1997; Tsatsos, Schefold, Schneider 1990). In the first comprehensive comparative analysis of party laws, Karvonen identified three main areas subject to party regulation: restrictions, including various types of bans or limitations on the orientation, activity, and organization of parties; definition of political parties as organizations, regulating the internal procedures, party registration, and financial management; and sanctions providing the right of the state to punish parties by legal means (2007). More recent research, embracing a larger number of sources of party law, has shown that the regulation of political parties touches on an even wider spectrum of party activities, includ-

ing their internal organization, registration and statutory requirements, ideological connotations, external functioning and behavior, internal financial management and external control (Gauja 2010; van Biezen and Borz 2012; van Biezen and Piccio 2013; Casal Bértoa, Piccio and Rashkova 2015).

A second group of scholars has looked at party regulation as an independent variable. Scholars have mostly concentrated on the effects of party regulation on party system dynamics, such as competition (Scarrow 2006), development (Pierre, Svåsand, and Widfeldt 2000), and new party entry (Tavits 2006; Bolin 2007; van Biezen and Rashkova 2012). Research has been particularly concerned to search for evidence of the cartel party thesis proposed by Katz and Mair, focusing on the degree to which regulations effectively constrain democratic processes, as the two authors suggested.<sup>2</sup> Others have observed the effects of party regulation on political corruption (Casal Bértoa, Molenaar, Piccio, and Rashkova 2014), trust (Witheley 2014), electoral volatility (Casas-Zamora 2006), party membership (Whiteley 2011), as well as on the organizational development of individual parties (Casal Bértoa and Spirova 2013; Nassmacher 2009; van Biezen 2003).

Finally, scholars have considered party regulation as a dependent variable. The recognition that party regulation by no means developed to the same extent or in the same form in all European democracies, and that in some countries political parties are heavily regulated whereas in others they are almost free from legal constraints, led scholars to question why significant variation in the region exists and why party regulation has taken specific forms in different countries. Even though several explanatory factors have been advanced, general agreement exists on the role played by historical trajectories, and by democratic (dis)continuity in particular, in shaping the different regulatory patterns. Research has shown that it is in particular countries that experienced the collapse of a democratic regime and an authoritarian rule that regulate political parties more heavily (Avnon 1995; Pinelli 1984, 2006; Karvonen 2007; van Biezen and Borz 2012; Casal Bértoa *et al.* 2015). Moreover, research has underlined that the growing regulation of parties is the result of a changing conception of representative democracy and of the role of political parties within it. From a liberal conception that perceived political parties as private organizations of citizens, after the end of the Sec-

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<sup>2</sup> Katz and Mair conceived party regulation, and the introduction of direct public funding to political parties in particular, as a means by which established elites could ensure their organizational survival despite their decreasing linkages with society and, at the same time, pose barriers to the emergence of new challengers (1995, 15). If the increasing dependence of political parties on state resources seems to confirm the former (cf. Piccio, 2014a, 2014b), no empirical evidence of exclusionary law-making to the detriment of new competitors has been found (see Pierre *et al.*; Scarrow 2006; Piccio and van Biezen 2015, forthcoming).

ond World War parties are being perceived as ‘public utilities’, that is agencies “performing a service in which the public has a special interest” (Epstein 1987, 157).<sup>3</sup> Hence, the recognition of the public, positive and desirable role that political parties perform in democratic societies has justified the legislative intervention in partisan activities, which has taken either the forms of imposing restrictions on parties, or conferring privileges (van Biezen 2008), or both. In their influential 1995 article, Katz and Mair offered a different interpretation. On the one hand, the two authors emphasized the endogenous nature of party regulation, underlying that parties devise their own legal environment. For political finance regulation, this implies that political parties have the “effective ability to write their own salary checks” (Katz and Mair 2009, 756). On the other hand they argued that by means of party regulation – public funding rules especially – political parties perpetuate their organizational survival and insulate themselves in the state, thereby compensating for their weakening linkages with society. In this perspective, party regulation constitutes a powerful instrument that political parties exploit in their own advantage.<sup>4</sup>

The introduction of rules providing state funding to political parties is of course the most obvious indicator suggesting a possible self-serve, instrumental use of party legislation by political actors aimed to strengthen their status and position in the political system and the state. This article draws attention to an additional indicator possibly pointing in the same direction, concentrating on the functional definitions of political parties in European party legislation. As we shall see in the following sections, while some of the crucial functions that party scholars have ascribed to political parties are considered in decline and a multiplicity of non-partisan actors have emerged challenging the parties’ monopoly over political representation, party legislation defines political parties in terms of a number of ‘eu-functions’. Before turning to the analysis of the functional definition of political parties in party legislation, I will discuss the functions that scholars have traditionally ascribed to political parties and the contemporary debate on the eroding capacity of the parties to perform some of these functions.

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<sup>3</sup> On the notion of parties as ‘public utilities’, see van Biezen (2004).

<sup>4</sup> A similar argument was brought up, in less explicit terms, by Paltiel in the late 1970s. Paltiel argued that what prompted public funding “was the desire of legislators to stabilize the party system and entrench the electoral position of established groups” (1979, 38).

### 3. Scholarly views on party functions

There are several ways in which political parties can be defined – as organizations, as institutions, as social structures – but is difficult to conceive political parties if not in relation to their performance of a certain set of activities. Even in the ‘minimal definition’ of political parties provided by Sartori (“any political group identified by an official label that presents at elections, and is capable of placing through elections (free or non-free), candidates for public office” (1976, 63)), we find them described in terms of a constitutive end. Yet, functional analysis, and the functional analysis of political parties, has been widely criticized (see, among others, Schonfeld 1983). Typically, functionalist perspectives are objected for being (i) ahistorical: they do not account for social change; (ii) conservative: by arguing that certain institutions are necessary they are actually justifying the existence of the social order as it is; (iii) teleological: they rely on the notion that social structures have purposes or goals, and understands political actors in system benefit terms (“eu-functions”); (iv) subject to selection bias: a value criterion interferes in the selection, in deciding what is, or is not, a party function (Sartori 2005); and, not least, (v) inadequate for comparative analysis: they rely on assumption on the universality of the functions across systems.

And yet, the functional study of political parties has remained fashionable. Reasons why so much attention has been paid to what political parties do or seek to accomplish should be found in the very intermediate nature of parties, and in the crucial position they occupy between the citizens and the state. Not coincidentally, scholars have returned questioning about party functions as soon as political parties have entered into their alleged ‘crisis’. As Webb argued, “if parties are really are in crisis, [...] then must it not reflect their failure to perform adequately some or all of the key tasks normally imputed to them?” (Webb 2005, 637). Hence, and largely intertwined in the debate on the crisis of political representation through political parties which is considered as one of the major problems of our time (Rosanvallon 2006), studies on the parties’ functional performance have been flourishing in the latest decades (Katz 1990; Mair 1998; Gunther and Diamond 2001; Daalder 2001; Webb 2005; Katz and Crotty 2006; Dalton, Farrell, McAllister 2011).

As Mair noticed, a remarkable consensus exists among scholars on what the functions that political parties are expected to perform in democratic polities (Mair 2003, 7). The “agreed inventory” of party functions (Webb 2005, 637) includes: (1) The integration and mobilization of the mass public; (2) The articulation and aggregation of interests; (3) The formation of public policy; (4) The structuring of the vote (‘electioneer-

ing’); (5) The recruitment of political leaders; (6) The organization of parliament and government.<sup>5</sup>

Scholars, with few exceptions claiming for more nuanced judgments (Webb 2005; Dalton, Farrel, and Mc Allister 2011), have pointed to the erosion of the parties’ capacity to perform the first three functions listed above. With regard to the function of integration and mobilization of the mass public, Pizzorno argued that the role played by political parties in socializing and integrating their members into the political community has become “redundant” in more advanced democracies (Pizzorno 1981). On turn, the articulation and aggregation of interests, once facilitated by societies based on strong social, subcultural and political identities has become more difficult to be performed by parties due to increased heterogeneity, social fragmentation and the consequent diversification of social demands (Andeweg 2003). Additionally, political parties lost their previously monopolistic position over political representation, mobilization and formation of political identities (Tarrow 1989; Pasquino 1980; Katz 1990), which they now share with new political collective actors, such as social movements and other groups emerged as alternatives to political parties (Schmitter 2001). Policy-making functions, finally, have been increasingly challenged by shifts in the decision-making loci from the national to the supranational arenas (Mair 1995), and by delegation to non-majoritarian institutions (Thatcher and Stone Sweet 2002). Conversely, the degree to which political parties are still able to perform the three latter party functions appears unaltered. Not only they remained principal actors in the functions of electioneering, recruitment of political leaders and the organization of the parliaments and governments, but the parties have become growingly intertwined with the institutional domain of politics by means of state dependency, patronage and state regulation (van Biezen e Kopecky 2007).

Bartolini and Mair (2001) proposed a distinction between two broader sets of functions: the representative functions, including the functions of articulation, interest aggregation and formulation of public policies; and the procedural (or institutional) functions, including election campaigning, the recruitment of leaders and candidates, and the organization of parliament and government (Bartolini and Mair 2001; Mair 2003).<sup>6</sup> In the light of the changes discussed above and the simultaneous transformations of

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<sup>5</sup> For discussions on the functions of political parties, see King 1969; Mair 1998; Gunther and Diamond 2001; Sartori 2005; Katz and Crotty 2006; Dalton, Farrell, and McAllister 2011.

<sup>6</sup> Similar broad typologies of party functions are presented by Pizzorno (1980), who distinguished between the demands’ transmission and exercise of delegation, and more recently by Katz (2014), who distinguished between interest articulation and interest aggregation. In both cases, by the first, parties act as speakers or “megaphones” of the citizens and by the second they act in the process of governing.

party organizations, they contended that contemporary political parties appear more adapt to perform the procedural functions, linked to the arena of political institutions, rather than the representative ones, linked to the arena of citizens' representation.

The erosion of the parties' representative capacity raises serious concerns about the functioning of modern representative democracies. Ignazi (2014) referred to a "reduction ad electionem" of the party functions, which has led to an erosion of their legitimacy (2014, 163). Following the expansion of universal suffrage, political parties have acquired a key position in shaping democratic processes, which can by no means be sustained by the sole roles of structuring campaign activities and organizing governments. It is in the perspective of political parties as 'linkage structures' (Lawson 1980) that political parties are considered as endemic to modern democracies (Schattschneider 1942). As previously mentioned, not all scholars agree with the decline of the parties' representative capacity. Webb suggested that parties have probably never really dominated all of the functions claimed for them (Webb 2005). Dalton, Farrel, and McAllister claimed instead that parties have managed to adapt to societal and environmental changes in a way to ensure that they continue to fulfil their functions, including the one of remaining a crucial linkage between the citizens and the government. It would be an exaggeration, they argued, to claim that some of their traditional functions have been rendered insignificant (2011, 20-21). This article does not engage in the debate on whether contemporary political parties do or do not perform the set of functions conventionally ascribed to them, or on how well they perform which set of functions vis à vis others. It focuses, instead, on the way in which political parties themselves conceive their functions. What are the functions that political parties claim to themselves?

#### **4. Party functions in party legislation**

According to Müller, party laws require that political parties fulfil "certain conditions, both in content (e.g., intra-party democracy, acceptance of the democratic order) and in form (e.g., party statute, minimal level of activity)" (1993, 421). However, beyond 'content' and 'form', and beyond determining who is entitled to be recognized as a political party, what forms of activity political parties may engage and what forms of internal organization and political behavior are acceptable for political parties (Katz 2004, 2-3), party laws also include a number of provisions with no prescriptive meaning and no legally binding implications: these are functional definitions of political parties that



are included often among the general provisions, preambles or in the very first articles of party laws.

As previously mentioned, not all European countries have codified political parties in their Constitutions or have introduced a specific Party Law or Party Finance Law. However, all thirty-three countries into consideration have regulated political parties in at least one of the three main sources of party law. The functional definitions of political parties that are taken into consideration for the present analysis require political parties to be the explicit subjects of the norms and require parties to be invested by explicit functions. The Estonian Party Law may serve as an example:

A political party is a voluntary political association of Estonian citizens and which is registered pursuant to the procedure provided for in this Act and the objective of which is to express the political interests of its members and supporters and to exercise state and local government authority. ([Estonia] Law on Political Parties, article 1.1).

This article provides a specific definition of political parties and defines explicitly what functions are ascribed to them: the articulation of citizens' interests and the organization of the government. Instead, norms that describe party functions but where citizens, rather than parties, appear as the subject of the sentence are not considered and will not be included. Article 49 of the Italian Constitution provides an example of such a case, where it states that

All citizens shall have the right to associate freely in political parties in order to contribute by democratic means to the determination of national policy. (Italian Constitution, article 49).

In this article – as often was recalled by Italian constitutional scholars (e.g.: Barbera 2006; Merlini 2008) – the citizens, not the parties, are the subject of the sentence. It is the citizens that participate, by associating in political parties, to the determination of national politics. Hence, the function of 'determination of national politics' does not define political parties. The functional definitions of political parties in party legislation are grouped according to the distinction between two sets of party functions presented by Bartolini and Mair (2001). Hence, the 'representative functions' heading includes norms concerning the functions of integration and mobilization of the mass public, articulation and aggregation of interests, and public policy formation; and the 'procedural functions' heading includes campaigning activities, leadership recruitment and the organization of parliament and government. The party functions mentioned in the three main sources of party law in Europe (Constitutions, Party Laws and Party Finance

Laws) are summarized in Table 1, covering data from thirty-three countries including long-established European democracies and ‘third wave’ democracies in southern and in central eastern Europe.

**Table 1: Functions of parties in European legislation**

Types of party functions	AU	BE	BG	CY	CZ	DE	DK	EE	ES	FI	FR	GR	HR	HU	IE	IS	IT	LT	LU	LV	MA	NL	NO	PO	PT	RO	RS	SE	SI	SK	SW	UA	UK	N
Representative functions	✓	✓	✓	✓		✓	✓	✓	✓	✓			✓	✓				✓	✓	✓				✓	✓	✓	✓		✓		✓	✓		21
Procedural functions		✓		✓		✓	✓	✓	✓	✓	✓	✓				✓		✓	✓	✓		✓			✓	✓	✓	✓	✓			✓		20
None					✓										✓		✓				✓		✓							✓		✓		7

Table 1 demonstrates that the large majority (N = 26) of countries included a definition of the functions of political parties in either one of the three main sources of party law. In three out of the seven countries that do not provide a functional definition of political parties, Italy, Czech Republic and Slovakia, references to party functions are present but do not define political parties specifically, as they have citizens as subjects of the sentence.<sup>7</sup> The four other countries, Ireland, Malta, Norway and the UK, characterize more generally for a particularly loose regulation of political parties. None of them has adopted a specific Party Law, and the political finance regulations are more limited (Piccio 2012).

The analysis also shows that the majority of the countries introducing functional definition of political parties refer to both their representative and procedural functions, and that equal importance is provided to both sets of functions. In particular, expression and vote structuring appear as the most frequently mentioned ones. The former is formulated with reference to the parties’ role in forming and aggregating the citizens’ political will, typically with statements such as:

The parties shall participate in the formation of the political will of the people [...]”  
([Germany] The Law on Political Parties, article 1.2)

<sup>7</sup> Both the Czech and the Slovakian Party Laws were first introduced in 1993 after the dissolution of Czechoslovakia, and include minimal amendments to the ‘Act on Associating in Political Parties and Political Movements’ adopted by Czechoslovakia in 1991. Hence, both Party Laws of 1993 open with the following article: “Citizens are entitled to associate in political parties and political movements (hereinafter only “political parties and movements”). By exercising this right, they are able to take part in political life, above all in formation of legislative assemblies, bodies of higher self-governing territorial units and local self-governing authorities” (art. 1.1).

Political parties assist in the formation and expression of citizens' political will through elections or other democratic means. ([Bulgaria] Political Parties Act, article 2.2)

They [i.e. political parties] are the expression of pluralism and they contribute to the formulation and expression of popular will. ([Spain] Organic Law 3/1987 of 2 July on the financing of political parties, Preamble)

In some countries, laws define party functions in great detail covering the whole range of party functions traditionally ascribed to political parties by party scholars. Consider, for example, the Portuguese Party Law, dedicating a specific article on the purposes of political parties.

The purposes of political parties shall be:

- a) To contribute to the pluralist enlightenment of citizens and to the exercise of their freedoms and political rights;
- b) To study and debate the problems of political, economic, social and cultural life at national and international level;
- c) To present political programmes and prepare election manifestoes;
- d) To submit candidatures for democratically representative elected bodies;
- e) Particularly from an opposition standpoint, to criticise the activities of the various bodies that belong to the State, the Autonomous Regions, local authorities and the international organisations to which Portugal belongs;
- f) To participate in the clarification of issues which are submitted to national, regional or local referendum;
- g) To promote the training and political preparation of citizens for a direct and active participation in democratic public life;
- h) In general, to help promote fundamental rights and freedoms and the development of democratic institutions. ([Portugal] Law governing Political Parties. Organisational Law no. 2/2003 of 22 August 2003, art. 2).

A similar level of detail appears in the legislation on political party of Germany, the "heartland of party law" (Müller and Sieberer 2005, 435), and in Eastern European countries such as Romania and Slovenia.<sup>8</sup> Moreover, functional norms on political parties have also been established in the legislation on political parties of the European

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<sup>8</sup> A more detailed breakdown of the intensity of party regulation by function and by country is presented in Piccio, 2015 (forthcoming).

Union. Under article 10(4) of the Treaty on European Union, “(p)olitical parties at European level contribute to forming European political awareness and to expressing the will of citizens of the Union”.<sup>9</sup> As Mair and Thomassen remarked with reference to the latter regulation, “despite its phrasing as an empirical statement, this is obviously meant in a normative sense” (2010, 23). Indeed, the presence of such a detailed account of party functions in legislation is not self-evident, as these are purely programmatic statements with no legally binding or prescriptive implications. The presence of such norms seems to provide additional evidence for Katz and Mair’s core argument that parties use legislation instrumentally, to strengthen their position within the state. By referring to their ‘eu-functions’ for democracy, legislators (which is political parties) seem to be willing to self-legitimize their institutional centrality. The timing of the introduction of these norms points to a similar interpretation. Table 2, which shows the year in which both the functional definitions of political parties and the provisions for direct public funding were first established,<sup>10</sup> shows that in the majority of cases functional definitions were introduced concomitantly or after the introduction of direct public funding to political parties, allegedly as a way to justify the material benefits deriving from it.

Indeed, in 11 countries the two provisions were introduced in the same legal document, and in 4 countries such functional definitions were established after the introduction of public funding. Moreover, with the relevant exceptions of Austria and France where three decades separate the establishment of the two rules, a closer look at the 10 countries where functional definitions preceded the introduction of state subventions reveals that public funding provisions very closely followed the introduction of functional definitions, thus very likely being introduced within the same political environment. The temporal sequence seems to further support a self-serve interpretation for the presence of functional definitions of political parties in European countries’ legal frameworks. Scholars observed that the introduction of public funding has required greater intervention from the state in the parties’ activities, entailing the establishment of rules providing their definition and legal status, and more generally a codified system of party registration and control (Mair 1998; Scarrow 2011). However, a list of the parties’ ‘eu-functions’ does not serve as a requirement for public funding to be disbursed. It may serve instead as a normative justification for it.

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<sup>9</sup> Consolidated version of the Treaty on European Union, Official Journal of the European Union, C 83/3, 30.3.2010, art. 10.4.

<sup>10</sup> The table does not include the seven countries that did not introduce a functional definition of political parties, nor does it include Switzerland which provides no direct public funding to political parties.

**Table 2: Functional definitions and direct public funding (year introduced)**

Belgium (FD & PF: 1989) – Bulgaria (FD & PF: 1990) – Croatia (FD & PF: 1993) – Denmark (FD & PF: 1987) – Estonia (FD & PF: 1994) – Finland (FD & PF: 1969) – Hungary (FD & PF: 1989) – Iceland (FD & PF: 2006) – Luxembourg (FD & PF: 1999) – Netherlands (FD & PF: 1999) – Slovenia (FD & PF: 1994)	Same law (n = 11)
Cyprus (FD: 2001; PF: 1991) – Romania (FD: 1991; PF: 1990) – Sweden (FD: 1974; PF: 1965)	After (n = 4)
Austria (FD: 1945; PF: 1975) – France (FD: 1958; PF: 1988) – Germany (FD: 1949; PF: 1957) – Greece (FD: 1975; PF: 1984) – Lithuania (FD: 1990; PF: 1999) – Latvia (FD: 2006; PF: 2010) – Poland (FD: 1990; PF: 1993) – Portugal (FD: 1974; PF: 1977) – Spain (FD: 1978; PF: 1977) – Ukraine (FD: 1996; PF: 2003)	Before (n = 10)

Key: FD = Functional Definition; PF = Public Funding

## 5. Discussion and conclusions

Party regulation has often been portrayed as an important instrument for warranting responsive, responsible and corruption-free parties and for ensuring, more in general, democracy to function properly. According to conventional wisdom, in the current climate in which political parties find themselves in a crisis of political representation, party legislation is a means by which parties can regain public confidence and re-establish their political legitimacy.<sup>11</sup> Yet, despite the increasing interference of European states in party affairs, research has shown that greater regulation does not result in more attractive, trusted, corruption-free parties (Whiteley 2014; Casal Bértoa *et al.* 2014; Piccio, Di Mascio, and Natalini 2014). Never in Western Europe have levels of mistrust of political parties been so high, the level of corruption in Europe is thought to have risen in recent years, while symptoms of societal disaffection have mushroomed throughout the continent. All in all, it appears that party regulation has not achieved its desired aims.

Lacking effectiveness is not the only problem of party regulation. Another problematic aspect lies in its endogenous nature, as parties act as “both those entities that construct the rules and those who play by them” (Gauja 2013, 10). Numerous scholars

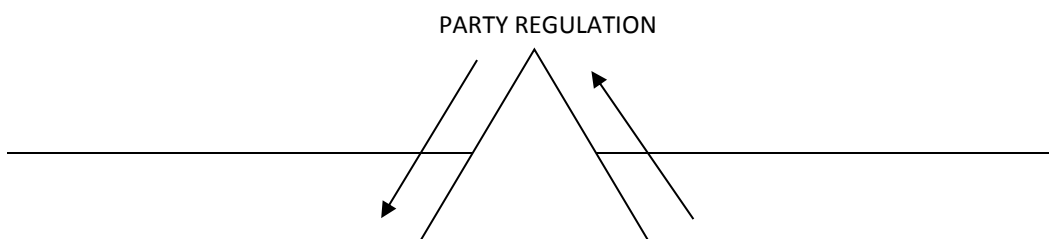
<sup>11</sup> The Italian debate on the necessity to introduce a Party Law is illustrative, as party regulation has been presented by political actors and mainstream media as a panacea that would cure the deep crisis of legitimacy of the Italian representative institutions. Noticeably, the *Guidelines on Political Party Regulation* adopted in 2011 by the Venice Commission of the Council of Europe and OSCE Office for Democratic Institutions and Human Rights (ODIHR) emphasize that states should try to avoid interfering in party affairs. The Guidelines state explicitly: “a specific law for political parties is not necessary for the proper functioning of democracy, and may be most effective when quite minimal in its scope” (p. 31).

have stressed upon the self-serve potential of party regulation and on the inherent conflict of interest arising as legislators are also partisans (e.g. Paltiel 1979; Nassmacher 1993; Katz and Mair 1995, 2009; Gauja 2010; Piccio 2014a). Party regulation constitutes a powerful instrument that political parties may exploit in their own advantage. Rather than ensuring democracy to function properly and restoring the legitimacy of parties in the public eye, it can be used by political elites to further their own interests.

The provision of direct public funding to political parties is a clear indicator of a situation by which parties grant themselves privileges and status, and by which the state becomes, as Katz and Mair argued, an “institutional structure of support” (1995, 16). This article centered on a second indicator possibly pointing in the same direction, drawing attention to the establishment of functional definitions of political parties in European party legislation. Two are the main empirical findings that emerged. First, the large majority of European countries included a definition of the functions of political parties in either one of the three main sources of party law. Indeed, party laws in Europe do not only define the formal, procedural and organizational requirements that parties must possess, but they also provide normative and non-prescriptive definitions of the functions that parties perform, with equal emphasis being provided to the representative and the procedural functions. Second, an analysis of the timing by which functional definitions and public funding provisions have been introduced showed that in the large majority of the cases the two norms were established (virtually) concomitantly.

Legal provisions on political parties have often been observed as manifestation of an underlying vision of the parties’ role, form and place within the democratic polity (Persily and Cain 2000; Gauja 2010; van Biezen and Borz 2012). Overall, party laws and Constitutions point to a conception of political parties as democratically desirable institutions (van Biezen 2008 2014). And yet, it is the parties’ underlying vision that emerges in party rules and it is the parties themselves who claim their democratically desirability. Portraying themselves, by means of the law, as actors performing crucial functions for democracy, parties created a self-legitimizing system in which they justify their institutional centrality. The circularity of this argument is shown in figure 1.

**Figure 1.** Party regulation as a self-legitimizing system





Mair mentioned the “extraordinary capacity of parties to ensure their own survival” (1995, 22) and that party legislation is a means that political parties use to further this end. The introduction of a list of ‘eu-functions’ of political parties can be interpreted in a similar manner, as an additional indicator pointing in the same direction. Here, privileges are neither material nor tangible as they are in the case of financial subventions, but yet they do strengthen the status of political parties within the system and protect them, as ‘eu-functional’ performers, as part of the state.

Various objections against this argument might be raised. First, it may be argued that it leaves the question open as to whether political parties actually act based on instrumental considerations. Inferring motivations for elected officials to act in one way or another is indeed problematic. Scholars working on the determinants of electoral institutions, another regulatory environment characterized by endogeneity and (potentially) being subject to lawmakers’ self-interested calculations, contend that pure self-interest calculations are too simplistic and ultimately incomplete explanations for understanding party behavior when establishing electoral reform (Bowler, Donovan, and Karp 2006; Bol 2013; Harfst 2013). Both power maximization and value-driven motives are valid approaches, as “each one captures a significant part of the real-world story, but each leaves much to be explained” (Renwick 2010, 9). References to party functions in European legislation and the particular emphasis provided to the parties’ representative role may reflect a genuine and authentic ambition of party actors. Many of these norms, in Eastern Europe especially, were introduced in the years immediately following the democratic transition and strongly associate political parties with essential democratic values and principles, such as political participation, pluralism, competition and popular sovereignty (Casal Bértoa and van Biezen 2014). In other words, regulations of this type could be conceived as an ideal model that parties aim to achieve, the role of parties being considered as crucial for the expressive and procedural linkages to be maintained between the citizens and the state. Hence, the argument that political parties have established a functionalist type of legislation responding to a self-serve, self-legitimizing logic should be argued with due caution. Further empirical research may contribute to a more nuanced understanding of the political actors’ motivation. Several are the possible trajectories of research. An analysis of the specific historical and institutional contexts which lead political actors to establish functional defi-

nitions of parties may bring to the fore specific path-dependent processes or critical junctures. Digitalized parliamentary proceedings, increasingly available across European countries, may constitute a highly relevant source of analysis. Another option is to contrast cases where functional definitions are present with cases where they are absent verifying the relevant intervening variables at stake.

Secondly, one might object that the argument of self-legitimation by means of regulation (i.e.: the circularity presented in figure 1) is not new. Several are the legal theorists who have stressed upon the intimate relation existing between law, politics, and democracy (see Caldeira, Kelemen, and Whittington 2008 for a recent review). Geddis, for example, underlined that “a legal system heavily relies on its democratic genesis for its legitimacy; yet democracy only ever exists in a procedural form created and controlled by the law” (2003, 1). Political parties operate as intermediary agents in that relationship, both setting up and being controlled by legal rules. And yet, for a legitimate interaction between the rule of law and the democratic principle, the system must be capable of reflecting the aspiration of the people. Thus, when we observe the presence of such statements and we simultaneously consider the ongoing crisis of political representation in contemporary Europe, the circularity of the model appears under a different light. Previous studies on party legislation pointed out that party laws have evolved and developed standards that appear obsolete. In particular, scholars noted a tendency of party law to privilege the outdated model of the mass party with noticeable discrepancies existing between the political reality and the legal rules (Gauja 2013; van Biezen and Piccio 2013; Katz 2014). This holds in particular with respect to legal prescriptions on the parties’ internal organizational functioning, such as minimum membership requirements (while membership-based parties are considered as belonging to the past, see van Biezen, Mair, and Poguntke 2013), or organizational presence on the territory (while parties, using ICTs as communication tools, are increasingly less territorially-anchored, see Römmele 2003). The inclusion of functional definitions of political parties and the particular emphasis provided to the representative functions leads to similar considerations. We find parties defined as representative agents notwithstanding the fact that their representative capacity has been eroding and has been taken over by other agencies of political expression that developed beyond parties (interest groups and social movements) and who might arguably do a better job in terms of citizens’ representation (Schmitter 2001). Ignazi referred to the “inevitable disappearance of the traditional party functions, tailored to societal traits of the past” (2014, 164). Interestingly, while such functions have disappeared in social reality, they acquired a legal status, becoming part of the legal frameworks on political parties in Europe.



This analysis suggests that the endogenous nature of party regulation poses important challenges to democracy and has the potential to undermine democracy's fundamental principles of political pluralism and free competition. Further examinations on the interaction between political parties, their lawmaking activity and democracy, and greater cross-fertilization between the scholarly literatures on political parties, political jurisprudence and legal theory would be therefore extremely valuable.

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